Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM WALTON GLAUSER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The District Of Texas

PETITION FOR WRIT OF CERTIORARI

GEORGE MICHAEL DEGEURIN
FOREMAN, DEGEURIN & NUGENT
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655-9000

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I.

Did the Court of Appeals err in finding that the evidence was sufficient?

II.

Did the Court of Appeals apply the wrong standard for harm analysis of constitutional error?

III.

Was the "deadly weapon" finding under Texas law unconstitutionally applied in these causes?

LIST OF ALL PARTIES

1. William Walton Glauser, Defendant-Petitioner.
2. The State of Texas, Plaintiff-Respondent.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, William Walton Glauser, through the undersigned counsel, and pursuant to Rule 12, files this petition for a writ of certiorari to the Court of Appeals for the First District of Texas, at Houston, Texas, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

The Court of Appeals affirmed the petitioner's convictions in an unpublished opinion on March 16, 2000. Rehearing was denied, with a dissenting opinion, on May 18, 2000. On October 5, 2000, the Court of Appeals withdrew its prior opinions and denied a further motion for rehearing and for rehearing *en banc* in a published opinion, with a dissent. *Glauser v. State*, ___ S.W.3d ___ (Tex. App. – Houston, [1st Dist.] 2001, pet. ref'd) (2000 WL 1476677). The majority and dissenting opinions are appended to this petition. The Court of Criminal Appeals refused discretionary review without a written opinion. A motion for reconsideration of the petition for discretionary review was denied without an opinion.

BASIS FOR JURISDICTION

1. The final opinion of the Court of Appeals for the First District of Texas was delivered on October 5, 2000. A petition for discretionary review was refused by the Texas Court of Criminal Appeals on May 16, 2001. A motion for

rehearing, timely filed on May 31, 2001, was denied by the Court of Criminal Appeals on September 12, 2001.

2. Petitioner asks this Court to review a final judgment of the Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

4. This petition is timely if filed on or before December 11, 2001.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Fourteenth Amendment to the United States Constitution, Section 1, reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Two indictments filed in a district court in Galveston County, Texas accused the Petitioner of Intoxication Manslaughter and Involuntary Manslaughter, resulting in the

deaths of Jason Dee Faul and Autumn Alford.[1] Both cases arose out of an automobile accident, in which Faul and Alford's small Hyundai was stalled in traffic late at night on a freeway and was hit by the Petitioner's car from behind. Faul was pushing the car while Alford tried to steer it. Faul, being essentially unprotected, was thrown a distance and died from injuries. Alford was fatally trapped in the damaged car, which caught on fire, frustrating rescuers.

The two causes were tried together, and a jury was instructed that it could find the Petitioner guilty only under one count in each cause. The jury found the Petitioner guilty of Intoxication Manslaughter in both causes (CR-172, 254).[2] Punishment in each cause was assessed at confinement for four years in the Texas Department of Criminal Justice, Institutional Division (CR-181, 263). The jury further found that the Petitioner used or exhibited a deadly weapon, namely the Petitioner's automobile, during the commission of the offense (CR-173, 255), which finding has consequences for availability of probation and duration of incarceration under Texas law. A motion for new trial was denied.

The Petitioner presented nine points of error, common to both causes, on appeal to the Court of Appeals for the First District of Texas, at Houston, Texas. On March

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[1] The consolidated clerk's record for both causes is designated "CR" herein, and the court reporter's record is designated "RR."

[2] The clerk's record, containing court documents, is designated as "CR" herein. The court reporter's record is designated as "RR" herein.

16, 2000, a panel of that Court affirmed the Petitioner's conviction in an unpublished opinion. After the Petitioner filed a timely motion for rehearing, the Court of Appeals issued a new opinion on May 18, 2000, denying the motion. Justice Michol O'Connor dissented to that opinion, believing that the evidence was legally and factually insufficient. The Petitioner again filed a motion for rehearing and for en banc rehearing (as permitted by Texas appellate rules when a new opinion issues), but those motions were denied on October 5, 2000, with Justice O'Connor dissenting again.

The next step in the Texas appellate process is a petition for discretionary review. After an extension of time for filing the petition was granted, the Petitioner filed that petition, presenting five issues for review, on December 6, 2000. The issues presented to the Court of Criminal Appeals included those now brought before this Court. The Court of Criminal Appeals refused discretionary review, without a written opinion, on May 16, 2001. Texas appellate rules permit a motion for rehearing if there are "substantial intervening circumstances," such as new legal developments, and the Petitioner sought rehearing on that basis. The motion was denied on September 12, 2001.

REASONS FOR REVIEW

I.

Did the Court of Appeals err in finding that the evidence was sufficient?

Jackson v. Virginia, 443 U.S. 307 (1979), established that the Due Process Clause of U.S. CONST. amend. XIV incorporates a requirement that evidence be sufficient to prove beyond a reasonable doubt that a defendant is guilty of the offense charged in the indictment. Recently this Court emphasized, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the State's burden of proof extends to each element of an offense, and indeed to any factor which functions like an "element" by raising the maximum punishment available.

The sufficiency issue in these two causes centered on one element in the governing Texas statute, namely causation. TEX. PENAL CODE §49.08(a) states:

> A person commits an offense if the person:
>
> (1) operates a motor vehicle in a public place, an aircraft, or a watercraft; and
>
> (2) is intoxicated and by reason of that intoxication caused the death of another by accident or mistake.

Although the statute compresses intoxication and causation into under one subsection, causation is a distinct element of the offense, which must be proved beyond a reasonable doubt. Causation in Texas law is defined by TEX. PENAL CODE §6.04(a):

> A person is criminally responsible if the result would not have occurred but for his conduct,

> operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

With this in mind, there was insufficient evidence on the particular causation element required by Section 49.08. The Petitioner's alleged intoxication by itself did not, and could not, cause the deaths of Faul and Alford. Only if proven intoxication caused the Petitioner to engage in dangerous driving, such as speeding or failing to keep a proper lookout for dangers ahead on the road, and that conduct in turn caused the fatal accident, would the Petitioner be guilty.

The dissenting opinion in the Court of Appeals pointed out that the majority opinion simply failed to come to grips with the other contributing factors which were not caused by the Petitioner's intoxication. Justice O'Connor obviously was correct in noting the strong possibility that a collision would have occurred anyway, given that "the victim's car was immobile on a full-moving freeway, it was dark and visibility was not good, and one of the victims was blocking the taillights of the car." Dissenting opinion, p. 2. The dissent correctly concluded that those other factors "could have made the collision inevitable, regardless of the [Petitioner's] intoxication." *Id.*

About all the majority opinion mustered in response to Justice O'Connor's observation was a fragment of opinion testimony by an investigating officer, in response to a hypothetical question, to the effect that someone who was *not* intoxicated and driving only 67 miles per hour could have avoided the collision. Yet the hypothetical

question posed to the officer did not postulate that Faul was behind the car and may have obscured visibility of the taillight.[3] The question only postulated a "disabled car" (RR VI-61). Nor did the premise of "67 miles per hour" correctly state either the posted speed limit or the actual speed of most of the cars on the freeway at that time.

For what it is worth, the decision in these causes did not even comport with Texas case law, extending over several decades, which has required proof of a causal link between a defendant's intoxication and fatality in an automobile accident. *Daniel v. State*, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979), in construing a predecessor statute, reiterated an observation made in *Long v. State*, 152 Tex.Cr.R. 356, 214 S.W.2d 303 (1948):

> Intoxication at the time and proof by the State, or finding by the jury under the court's instruction, that there was a death will not in that abstract form support a conviction. *The death must be the result of the intoxication and proof must be made and submitted to the jury of that thing*

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[3] The light later was determined to have electrical current. Of course it is a long step from proof of available electrical current to the conclusion that a light was sufficiently lit to be seen at a distance, and yet a further step to conclude that a sober motorist who saw a taillight ahead at night would know soon enough that the car ahead was not moving at highway speed. At least in the Fifth Circuit, the pyramiding of inferences to establish sufficient evidence is impermissible. *Menesses v. United States*, 962 F.2d 420 (5th Cir. 1972). Whether Fourteenth Amendment sufficiency doctrine also should limit the stacking of inferences in a state prosecution is a subordinate question which is interesting and important in itself.

> *which worked a causal connection between the intoxication and the death.*

(Emphasis added). In that context, "proof" must mean "proof beyond a reasonable doubt." *Apprendi, supra.* Although a particular state's case law does not define due process, the denial of the benefit of that case law to a defendant, after it was pointed out to the appellate courts, does suggest arbitrariness in the state courts and should prompt this Court to take a close look at whether due process was satisfied.

II.

Did the Court of Appeals apply the wrong standard for harm analysis of constitutional error?

The Petitioner contended in the Court of Appeals that the trial court erred in permitting the State to shift the burden of proof to the Petitioner. This occurred during the State's voir dire while the prosecutor was discussing potential evidence at trial concerning a test of the Petitioner's blood to determine his intoxication:

> Prosecutor: . . . And so this defendant is represented like all defendants by a lawyer and they have a right to go out and get the blood tested themselves. . . .

(RR IV-33). Defense counsel objected and then, with the jury removed, explained that the argument effectively shifted the burden of proof. The trial judge refused to give the jury a contemporaneous instruction. The written jury instructions, submitted days later, contained only an

abstract explanation that the State had the burden of proof.

The Court of Appeals held that "the trial court erred by refusing defense counsel's request to instruct the jury during voir dire that the defendant had no burden to produce evidence." Majority Opinion of October 5, 2000, slip opin., p. 17. Nevertheless, the Court of Appeals found that the error was harmless. In so doing, the Court of Appeals employed the wrong standard for harm analysis.

The Court of Appeals declared that "the error was not of constitutional magnitude" and therefore chose the variation of the Texas appellate rule controlling harm analysis which is applied to non-constitutional errors. This was done despite the Petitioner's ongoing argument, ever since his first brief, that the error was constitutional in nature. The Court of Appeals' finding that the error was not constitutional conflicts with this Court's case law and warrants review under SUP.CT. R. 10(c). Furthermore, the Court of Appeals' error led to application of a harmless-error standard which also conflicts with that adopted by this Court for constitutional error.

This Court has held that it is unconstitutional – specifically, a violation of Fourteenth Amendment due process – to shift the burden of proof to a defendant regarding an offense element in a criminal case. *Mullaney v. Wilbur*, 421 U.S. 684, 700-701 (1975). More recently, *Apprendi, supra* showed that *Mullaney* is alive and well.

Nor does it matter that the burden-shifting occurred during voir dire. If anything, the suggestion early in the

proceedings that the Petitioner carried a burden of presenting his own scientific evidence regarding alcohol concentration in the blood was apt to be particularly damaging because it remained unchecked throughout the entire evidentiary phase of the trial, which lasted over a week. Then, when burden of proof was addressed in the court's charge to the jury, it only was explained in the abstract, with the charge only saying that the State had to prove "each and every element of the offense charged beyond a reasonable doubt" (RR XI-25). That did not necessarily make it clear that the Petitioner had no burden of producing evidence. In particular, there was no specific explanation to the jury that the petitioner had no burden whatsoever to produce his own scientific evidence regarding intoxication.[4]

A useful comparison may be made to *United States v. Hernandez*, 176 F.3d 719 (3rd Cir. 1999), which reversed a

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[4] Texas statutory law forbids a trial court judge to comment on particular evidence in the court's charge. TEX. CODE CRIM. PROC. art. 36.14 provides in part:

> . . . [T]he judge shall, before the argument begins, deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

While that statute is aimed at preventing a trial judge from giving a jury the judge's view of the weight and credibility of evidence, the practical effect of the statute is to make judges steer clear of all comments on specific evidence, even when, as in these causes, there is a specific evidentiary matter on which the burden needs to be clarified due to earlier error.

conviction after a trial judge gave an incorrect explanation of the concept of reasonable doubt during voir dire. That error was not cured by a correct instruction in the court's charge. *Hernandez, supra* at 731 stated:

> Subsequent amplification can fill the interstices in an incomplete explanation. However, when an erroneous instruction is given, a subsequent clarification must be sufficiently clear and compelling to allow a reviewing court to conclude that there was no reasonable likelihood that the initial inaccuracy affected the jury's deliberations.

Hernandez found support for that conclusion in *Francis v. Franklin*, 471 U.S. 307, 322 (1985). In *Francis, supra* at 322 this Court observed that "language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." While *Hernandez* relied on the due process clause of U.S. CONST. amend. V, its reasoning applies equally well to Fourteenth Amendment due process. Of course *Francis* itself originated as a state case.

Once it is recognized that the error was constitutional, and that the Texas court decided to the contrary in conflict with this Court's case law, an interesting subordinate question arises: Should this Court look to its own case law or to the text of the State rule on constitutional error, namely TEX. R. APP. PROC. 44.2(a)? Happily, the result is the same either way. In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that error required reversal unless a reviewing court is able to "declare a belief that [the error] is harmless beyond a reasonable doubt. *Id.* at 24. Reasonable doubt as to harm exists if there is "a

reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.*, citing *Fahy v. Connecticut*, 375 U.S. 85 (1963). The *Chapman* standard was reiterated in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Rule 44.2(a) mirrors this approach, stating:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

Confusing the jury about the burden of proof on an important element of the charged offense, *i.e.* intoxication, cannot be considered harmless beyond a reasonable doubt, assuming harm can be assessed reliably at all.

This Court has two paths it could take to rectify the Court of Appeals' error. One path would be a summary remand, pointedly directing the Court of Appeals to apply the correct standard for harm analysis. That approach has the virtue of speed. On the other hand, since the sufficiency issue also is worthy of this Court's attention, and would yield greater relief, it would make sense to grant the writ of certiorari and study both issues before deciding which form of relief is warranted.

III.

Was the "deadly weapon" finding under Texas law unconstitutionally applied in these causes?

A third reason why the writ of certiorari should be granted is that these causes present some important due-

process issues, which arise as to both the content of certain statutes at issue and the process of statutory interpretation in general. These causes call for the Court to follow a path which crosses the familiar turf of vagueness analysis and leads to the unsettled question of the incorporation of the "rule of lenity" in due-process analysis.

Under TEX. CODE CRIM. PROC. art. 42.12, §3g(a)(2), a jury may be called upon to decide whether an object involved in the commission of an offense constitutes a "deadly weapon" in the manner of its use or intended use. This statute, which directly determines whether or not the alternative punishment of community supervision (commonly called "probation") is available and indirectly determines what percentage of a prison sentence actually is served,[5] provides:

> (a) The provisions of Section 3 of this article do not apply:
>
> . . . (2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhbited. On an affirmative finding under this subdivsion, the trial court should enter the finding in the judgment of the

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[5] TEX. GOV'T CODE §508.145(d) makes a Texas prison inmate ineligible for release on parole until half his sentence is served if he is imprisoned for "an offense for which the judgment contains an affirmative finding under Section 3g(a)(2)" of TEX. CODE CRIM. PROC. art. 42.12.

> court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in the judgment.

TEX. PENAL CODE §1.07(a)(17), incorporated by reference in the foregoing statute, defines a "deadly weapon" as:

> (A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
>
> (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Prior to trial the Petitioner objected to the submission of the "deadly weapon" issue in these causes, where the State was contending that the motor vehicle driven by the Petitioner was a "deadly weapon" (CR-130, 236). Nevertheless, the trial court submitted the issue to the jury, and the jury found in each cause that the vehicle, while being driven on a highway, was capable of causing death or serious bodily injury and constituted a "deadly weapon."

On appeal, as in the trial court, the Petitioner confronted two decisions by the Texas Court of Criminal Appeals, *Tyra v. State*, 897 S.W.2d 796 (Tex. Crim. App. 1995) and *Walker v. State*, 897 S.W.2d 812 (Tex. Crim. App. 1995), which had held that a vehicle driven by an intoxicated driver could constitute a "deadly weapon" for purposes of Article 42.12, Section 3(g)(1)(2), even though the only "use" of the vehicle was the act of driving it upon a highway. Under those cases, it is not necessary to show either that a motorist was trying to use a vehicle aggressively, such as to run over or ram a person or vehicle in

an act of "road rage," or even was engaging in reckless "daredevil" driving, such as drag racing on a street. Furthermore, the Texas offense of Intoxication Manslaughter itself requires no culpable mental state. The Petitioner specifically urged, throughout the Texas appellate process, that *Tyra* and *Walker* be overruled, knowing that only the Texas Court of Criminal Appeals had the authority within the Texas judicial system to take that step. The Court of Criminal Appeals refused to grant review.

Three aspects of the reasoning in *Tyra* are crucial here. First, *Tyra* drew upon an opinion in *Patterson v. State*, 769 S.W.2d 938 (Tex. Crim. App. 1989) which, according to *Tyra*, "construed the phrase 'used or exhibited a deadly weapon' by opening it to the broadest possible understanding in context of which it was reasonably susceptible in ordinary English." 897 S.W.2d at 797. That "understanding" or definition was: "carrying out a purpose by means of [the thing.]" *Id.* The *Patterson* court made that choice from among seven different meanings of the word "use." *Id.*

Second, *Tyra* reasoned that the word "weapon" was given a broad meaning, "however unfair or counterintuitive it may seem to apply it in the instant cause," when the Legislature included "those things which are capable of causing death in the manner of their use, not just those things which are manifestly designed to cause death or which will cause death if used as intended." *Id.* at 799.

Third, the *Tyra* majority opinion itself suggested potential problems of constitutional dimension, but dispatched them summarily:

> The statute may not be a model of specificity. But we cannot say that it is too vague for rational enforcement either. The fact is that the Legislature might not actually have contemplated application of the statute to a variety of circumstances, including those presented here. But the statute on its face does apply to these facts.

Id. at 799. "Might not actually have contemplated" is an understatement. In reality, legislative history affirmatively demonstrates that the Texas Legislature had in mind an offender's affirmative choice to use a weapon in the commission of an offense when it adopted the "deadly weapon" provision. The intended thrust of the legislation was made quite clear in a hearing conducted by a subcommittee of the Texas Senate on February 15, 1977. At that time the committee considered S.B. 152, sponsored by Sen. Bill Meier of Tarrant County, Texas, which sought to create the "deadly weapon" provision now found in Article 42.12, §3g. The dialog between witnesses and senators revealed that the purpose of the legislation was to crack down on the use of weapons in the commission of crimes such as robberies and sexual assaults, where the introduction of a gun or other weapon into the equation significantly escalated the risk. A concurring opinion in *Tyra* referred to the comments of "one individual," but this "individual" was David Dean, the legislative spokesman for the Governor of Texas. What was really the Governor's view, excerpted in a concurring opinion in *Tyra, supra* at 803, was as follows:

> MR. DEAN: Of course, I think that the point we are trying to get to when we use the language of "used or exhibited" is simply to say that if a person is going to commit an offense, leave that

> firearm at home. Don't take it with you. Don't have the opportunity to use it; don't exhibit it. Don't be around a firearm if you are going to commit an offense because you know that if you do[,] the offense or the penalty or the combination of the two would perhaps be more onerous than if you commit the offense without the use of a firearm.

That certainly does not sound like an intent to convert every object which somehow becomes lethal into a "deadly weapon," limited only by the creativity of prosecutors. Nor does the comment of Sen. Meier, the sponsor:

> SEN. MEIER: . . . But as I was saying that I think that we are drafting this language as carefully as can be drafted to limit it to the use or exhibition of firearms *as an affirmative action on the part of the defendant* charged with one of these serious crimes (emphasis added).

While Sen. Meier's focus on "firearms" was broadened in the final version, there is no basis for thinking the Legislature or the Governor intended to construe any use of an object which led to death, regardless of the actor's state of mind, to fall within the statutory meaning of the "use of a deadly weapon." In short, *Tyra* and *Walker* unquestionably went beyond what the Texas Legislature intended, and quite likely beyond anything the Legislature even considered, in approving a broad and protean concept of the phrase "use a deadly weapon."

These causes thus present a relatively rare but extremely significant form of due-process violation: one which is primarily attributable to appellate courts, not to a trial court or the trial-court prosecutor. The Court of Criminal Appeals, by adhering to *Tyra* and *Walker* in

these causes, has perpetuated a statutory interpretation which suffers from twin evils: (a) ambiguous statutory language has been construed contrary to a common-sense understanding of the statute, turning the statute into a snare for the unwary; and (b) ambiguous statutory language has been construed in conflict with the rule of lenity. When these problems are considered, either separately or together, the effect of the Court of Criminal Appeals' refusal to correct the mistaken reasoning of *Tyra* and *Walker* rises to the level of a due-process violation. Rather than adopting a statutory interpretation which avoids constitutional problems, as recommended by *Immigration and Naturalization Service v. St. Cyr*, ___ U.S. ___, 121 S.Ct. 2271, 2279, ___ L.Ed.2d ___ (2001) and cases cited therein, Texas courts continue to cling to an interpretation which perpetuates such problems.

A. Vagueness

This Court has long recognized that a statute may be too vague in its application to satisfy due process. In *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), this Court explained:

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

The Court cited *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), which in turn traced the principle back to *Connally*

v. General Construction Co., 269 U.S. 385 (1926). *Kolender, supra* at 358, quoting from *Smith v. Goguen*, 415 U.S. 566, 574 (1974), also pointed out that "the more important aspect of the vagueness doctrine" was "the requirement that a legislature establish minimum guidelines to govern law enforcement." This does not merely refer to the police on the streets, but also includes the risk that statutory language allows prosecutors and juries "to pursue their personal predilections" in applying a statute. *Kolender, supra*, quoting *Smith*.

Both aspects of the vagueness problem are presented here. The reasoning of *Tyra*, which converts a car into a "deadly weapon" merely by virtue of its "use" for its normal purpose, goes far beyond any warning about driving conduct presented within the statute itself. As shown above, *Tyra* went well beyond what even the legislators and the Governor who were actively involved in the legislative process had in mind. Texas prosecutors, taking advantage of what *Tyra* conceded to be the broadest available definition of the word "use," have expanded the concept of "using a deadly weapon" far beyond the scope of what a person of average intelligence would understand as being the "use of a deadly weapon." This is not ameliorated by the reference in *Tyra* to the statute being applied to "reckless" driving.[6] The offense of Intoxication Manslaughter under Texas law does *not* require any culpable mental state, including recklessness as

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[6] *Tyra, supra* at 799 declared that the applicability of the "deadly weapon" provision was clear enough to the conduct of "driving an automobile recklessly enough to endanger the lives of other people."

defined by TEX. PENAL CODE §6.03(c).[7] Nor does the "use" prong of Article 42.12, §3g and its incorporation of TEX. PENAL CODE §1.07(a)(17). This lack of a *mens rea* aggravates the vagueness problem. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *Screws v. United States*, 325 U.S. 91 (1925).[8] This is no academic question in these causes, for the jury, instructed to choose only one of the two counts in each cause, twice opted for the strict-liability Intoxication Manslaughter count and eschewed the Involuntary Manslaughter count which included an allegation of "recklessness."

Thus adherence to *Tyra* and *Walker* by the Court of Criminal Appeals, the only court with the power to correct the error in those cases, has created vagueness which could have been avoided by paying attention to evidence of what the Texas Legislature intended. This Court recognizes that determination of legislative intent is the main

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[7] The statute defines "recklessness" as follows:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

[8] Indeed, a statute which merely requires knowledge or awareness of "traditionally lawful conduct" is on thin constitutional ice even if it is not vague. *Staples v. United States*, 511 U.S. 600, 618 (1994); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996).

objective of statutory interpretation. See, for example, *Alexander v. Sandoval*, ___ U.S. ___, 121 S.Ct. 1511, 1519, ___ L.Ed.2d ___ (2001). By ignoring legislative intent, the Texas Court of Criminal Appeals created a constitutional problem where none might have existed.

The Petitioner pointed out in the courts below that *Tyra* and *Walker* were incorrect. Why, then, did the Court of Criminal Appeals not act to correct its error when given the chance to do so here? The summary refusal of review leaves that question unanswered, but lurking in the background may be a peculiar Texas doctrine which holds that the Legislature is presumed to implicitly adopt a court's construction of a statute if the Legislature does not affirmatively refute it. Such "implicit ratification" is logically and legally unsound, as there is nothing in the Texas Constitution which empowers the Texas Legislature to make law "implicitly," let alone any constitutional provision which "implicitly" adds the Governor's signature of approval. Even on its own terms, however, "implicit ratification" does not hold up in this instance, since the Court of Criminal Appeals has deemed the doctrine a "presumption." *Miller v. State*, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000). This Court has denounced mandatory presumptions, i.e., presumptions which do not yield in the face of facts, in the trial context, such as in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Thus there is an important incorporated issue here as to whether an appellate presumption such as the Texas "implicit ratification" presumption can stand constitutionally in the face of evidence showing that the Texas Legislature did not have in mind the statutory interpretation crafted by the Court of Criminal Appeals.

B. Rule of lenity

These causes also call for consideration of whether the "rule of lenity" should apply as a matter of Fourteenth Amendment due process. The rule of lenity has been used by this Court a number of times to construe federal penal statutes. The concept was summarized in *Cleveland v. United States*, ___ U.S. ___, 121 S.Ct. 365, 373, ___ L.Ed.2d ___ (2000), quoting from *Rewis v. United States*, 401 U.S. 808, 812 (1971): "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." In particular, if statutory language which determines punishment is vague or ambiguous, a construction which yields a less severe punishment is favored.

This Court has applied the rule of lenity in the context of federal statutory interpretation. It is an open question whether the rule of lenity is incorporated within Fourteenth Amendment due process. *Rewis* relied on *Bell v. United States*, 349 U.S. 81 (1955), which obviously involved federal law. A half-century of application does not automatically make a doctrine part of due process, but it does show a sufficiently long acceptance and use to raise the issue of whether the doctrine should be incorporated into due process. The rule of lenity also makes good sense as a matter of policy, particularly since, as recognized in *Mullaney* and *Apprendi*, the practical distinction between an offense "element" and a punishment factor often is elusive.

Separately or together, these problems should be considered sufficient to call into question the constitutionality of the Texas statutory "use of a deadly weapon" provision as it has been applied in these causes.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari as to all three questions in this cause.

Respectfully submitted,

GEORGE MICHAEL DEGEURIN
FOREMAN, DEGEURIN & NUGENT
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655-9000

Counsel of Record for Petitioner

APPENDIX

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App. 1

Opinion issued October 5, 2000

(LOGO)

In The
Court of Appeals
For The
First District of Texas

NOS. 01-98-00891-CR
01-98-00892-CR

WILLIAM WALTON GLAUSER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause Nos. 97CR0019 and 97CR0020

OPINION ON FURTHER MOTION FOR REHEARING AND FOR REHEARING EN BANC

We issued an opinion affirming appellant's convictions on March 16, 2000. Appellant's counsel filed a motion for rehearing which we denied in a per curiam opinion on May 18, 2000. Justice O'Connor filed a dissenting opinion on motion for rehearing.

On June 16, 2000, appellant filed a further motion for rehearing and for rehearing en banc. These motions are **denied**. However, we withdraw our previous opinions and issue the following opinion.

Appellant, William Walton Glauser, was convicted by a jury of two charges of intoxication manslaughter. *See* TEX. PENAL CODE §49.08. The jury assessed punishment at four years imprisonment in each case. In nine points of error, appellant challenges the legal and factual sufficiency of the evidence, and complains of the following trial errors: the trial court's overruling of his objection to the State's voir dire; the trial court's denial of two of appellant's challenges for cause; the State's jury arguments on guilt and punishment; and the trial court's submission to the jury of the special issue on the use of a deadly weapon. We affirm.

THE FACTS

On Saturday, December 14, 1996, 18-year-old Jason Faul and 15-year-old Autumn Alford spent the evening with friends in Galveston. Between 2:00 and 3:00 a.m. the next morning, Faul borrowed Amanda Nixon's 1988 Hyundai to take Alford home. Neither Faul nor Alford had been drinking.

During the early morning hours of December 15, 1996, Donald Ciaccio, traveling with passengers Gary Johnson and Dan Robinson, was driving south on Interstate 45 north of Almeda mall. A black Honda Accord, which appeared to be going 100 to 120 miles per hour, passed their vehicle. They later saw the same Honda parked on the shoulder of the road and a man urinating beside it. Ciaccio had his cruise control set on 67 miles per hour, and when he drove by the La Marque factory outlet stores, the Honda again passed him in the right lane. Ciaccio estimated its speed at over 100 miles an

hour. About 150 yards south, Ciaccio saw the Honda run into the back of the Hyundai. Other than the Hyundai, there were no other cars in front of Ciaccio when appellant passed him. Ciaccio called 911 and stopped to help.

That same morning Robert Meier and his wife were driving south on Interstate 45 in Galveston County. Meier was driving his pickup at 65 miles per hour in the center lane when he noticed a vehicle approaching from behind. The vehicle changed lanes without signaling and went around Meier in the left lane so close that Meier thought the car was going to hit him. Meier estimated the vehicle's speed to be over 100 miles per hour because "it passed [him] like [he] was standing still." After it passed Meier, the vehicle returned to the center lane, again without signaling. Other than the speeding vehicle, Meier saw no other cars on the straight highway. About a mile to a mile and a half down the highway, Meier saw an "explosion, a ball of flame." He pulled over and stopped to render assistance.

Kenneth Walker, John Thayer, and Paul Pinkston were northbound on Interstate 45 that morning. As they crossed an overpass, they saw the explosion on the south side of the highway and also stopped to help. Walker jumped over the median and saw Faul on the highway. After checking Faul's body for a pulse, he proceeded toward the Hyundai.

Nixon's Hyundai, its headlights still on, was on fire, and Alford was in the front seat. Meier, Johnson, Walker, and Pinkston tried unsuccessfully to free her from the car, but the door was jammed and Alford's legs were trapped. The men flagged down other drivers, asking if anyone

had a fire extinguisher or a chain to pull the door open. Alford begged them to put out the fire and pour water on her. She screamed that she was hot. They were not able to get her out of the car or extinguish the fire which engulfed the car. She died at the scene.

Appellant was standing next to his Honda Accord when Walker approached. Walker could smell alcohol on appellant. Appellant asked what happened, and Walker told him he had hit somebody. Appellant's response was that "they were stopped in the middle of the highway." Pinkston heard appellant say he did not see any lights or flashers.

Department of Public Safety Trooper Wayne Neubauer was dispatched to the scene at 2:52 a.m. and arrived at 2:55 a.m. The La Marque Fire Department, paramedics, the Galveston County Sheriff's Department, and the La Marque Police Department had already arrived. Neubauer saw a body, later identified as Faul, in the middle lane of Interstate 45. A red Hyundai was on fire. Appellant was standing beside his Honda. He told Neubauer that he was driving, and that "those stupid people just stopped in the road with no lights on." He also said that he had been going only 45 miles an hour, and that he put on his brakes and tried to miss them. Neubauer smelled a strong odor of alcoholic beverage on appellant's breath. According to Neubauer, appellant swayed as he stood and slurred his speech when he spoke. In Neubauer's opinion, appellant was intoxicated.

At the point of impact, Neubauer found no skid marks on the highway to indicate that appellant had applied his brakes before the collision. Neubauer testified

that appellant's Honda in that situation was a deadly weapon. In Neubauer's opinion, a person traveling 67 miles an hour in the same lane as a disabled vehicle at this location would have seen the disabled vehicle in time to stop. The area was well lit by the lights from the La Marque factory outlet mall just north of the burn scene and by freeway street lights.

The right front side of the Honda sustained significant damage and had human blood and fibers in several locations. Neubauer concluded that Faul was outside the Hyundai at impact because of the severe damage to his legs. It is a reasonable inference from the evidence that, at impact, Faul was pushing the disabled Hyundai while Alford was steering from the driver's side.

Neubauer collected light bulbs from the Hyundai and submitted them to the crime lab. David Spence tested the bulbs and discovered that the two-filament bulb of the right rear brake/running light indicated that one of the filaments was burning at impact.

Appellant was taken by ambulance to John Sealy Hospital in Galveston. Neubauer directed Galveston County Sheriff's Deputy Donald Wheelus to collect a sample of appellant's blood. Wheelus went to the hospital and located appellant in the emergency room. He identified himself and advised appellant of his rights. Appellant consented to having a sample of his blood drawn. Cindy Siurko, a registered nurse working in the emergency room, drew the sample. She smelled alcohol on appellant's breath. After Wheelus left, Siurko heard appellant say to one of the nurses, "I'm f___ed, aren't I?" The nurse asked appellant what he meant, and he said,

"Well, I have been drinking on and off all day and I had a couple of more drinks before the accident."

Wheelus took the blood sample to Neubauer who delivered it to the Department of Public Safety crime lab. The lab supervisor, Lou Haby, tested the sample and found it contained 0.21 grams of alcohol per one hundred milliliters of blood.

The Chief Medical Examiner for Galveston County, Dr. William Korndorfer, performed autopsies on the bodies of Faul and Alford. He determined that the numerous injuries to Faul were consistent with his having been a pedestrian struck by an automobile traveling at a high rate of speed. Alford's body was badly burned, her legs and pelvis were broken, and the large blood vessels in the pelvis were torn. There was no soot in her mouth or lungs, indicating that, although she suffered from the heat and flames, she bled to death internally before breathing any smoke. Alford's injuries were consistent with her having been seated in a car that was struck from behind by another automobile traveling at a high rate of speed. Toxicology tests performed on both Faul and Alford were negative for alcohol and drugs.

Senior Trooper Kevin Bryce of the Department of Public Safety was asked to assist with accident reconstruction. He and Neubauer took measurements of the scene using a surveying instrument. He determined that the Honda traveled 331 feet after impact, and that the Hyundai traveled 158 feet on pavement and 31 feet on the grass. He calculated that if the Hyundai was stopped or moving at only one mile per hour, and if all four wheels of the Honda locked at impact, the speed of the Honda at

impact was 111 miles per hour. If two wheels of the Honda locked at impact, its impact speed was 95 to 96 miles per hour. Assuming no braking or locking of the Honda's wheels after impact, its impact speed was 90 to 91 miles per hour. The most likely scenario, according to Bryce, was that only the front wheels of the Honda locked at impact, and this was because of metal collapse. He explained that post-impact skid marks ended near the front wheels of the Honda, and there were none from the rear wheels.

For the defense, a friend of appellant, Ned Snyder, testified that he was driving south on Interstate 45 between 2:00 and 3:00 a.m. on December 15, 1996, and witnessed the collision. He testified that he was in the center lane, and that about 250 yards ahead of him were several other cars. He saw a car move to the left, then another car hit the back of the car that caught fire. The car that was struck did not have taillights. He did not see any brake lights before the collision. Snyder stopped, and by then the Hyundai was burning. There was nothing he could do for the girl inside. He approached the black car and recognized appellant. Snyder did not believe appellant was intoxicated.

Appellant's father testified that when he arrived at the hospital at 5:00 a.m., appellant did not appear to be intoxicated. Angie Reckling and Robert Whilden testified that, on the night in question, they had dinner in a restaurant with appellant and his parents, and appellant did not appear to be intoxicated when he left at 12:30 a.m.

Mike James, an engineer and accident reconstruction expert, testified for appellant that in his opinion, only the

right front wheel of the Honda locked at impact. Using this factor and the post-impact distances recorded by Bryce, James calculated that the speed of the Honda at impact was 80 miles per hour. Based on the measurements taken by Neubauer during his initial investigation at the scene, James calculated the Honda's impact speed at 77 miles per hour.[1]

LEGAL SUFFICIENCY OF THE EVIDENCE

In point of error one, appellant challenges the legal sufficiency of the evidence to support his convictions. Specifically, he challenges the evidence of causation. Appellant argues the evidence did not prove that he caused the deaths of Faul and Alford "by reason of intoxication."

A. The Law

The intoxication manslaughter statute provides, in pertinent part:

> (a) A person commits an offense if the person:
>
> (1) operates a motor vehicle in a public place, . . . ; and
>
> (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.

TEX. PENAL CODE §49.08(a).

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[1] According to measurements Neubauer took that night, the Hyundai was 184 feet from the point of impact, and appellant's Honda was 298 feet from the point of impact.

In evaluating a claim of legal insufficiency of the evidence, we follow the usual standard of review. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

B. Analysis

Appellant correctly asserts the State must prove that a defendant's intoxication, and not just his operation of a vehicle, caused the fatal result. *See, e.g., Hardie v. State*, 588 S.W.2d 936, 939 (Tex. Crim. App. 1979); *Daniel v. State*, 577 S.W.2d 231, 233-34 (Tex. Crim. App. 1979); *Thomas v. State*, 756 S.W.2d 59, 61 (Tex. App. – Texarkana 1988, pet. ref'd).[2]

In this case, the evidence consistent with guilt showed that appellant was driving a Honda Accord on Interstate 45 at approximately 100 miles an hour at night

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[2] These were appeals from involuntary manslaughter convictions under section 19.05(a)(2) of the pre-1994 Texas Penal Code. That statute provided, in part:

(a) A person commits an offense if he:

. . .

(2) by accident or mistake when operating a motor vehicle, airplane, helicopter, or boat while intoxicated and, by reason of such intoxication, causes the death of an individual.

Amended by Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614, 3766. With the exception of the additional element that the motor vehicle, aircraft, or watercraft be operated in a public place, this statute and section 49.08(a) are substantially the same.

when the speed limit was 65. By his own admission, appellant had been drinking on and off all day and had a couple of more drinks before the accident. A blood test revealed appellant's blood alcohol content to be 0.21, more than twice the amount that defines intoxication in the Penal Code.[3] In an area that was well lit with no visible obstructions, appellant, without ever applying his brakes, hit Faul and the back of the disabled Hyundai, which had its headlights and at least one taillight on. In the investigating officer's opinion, someone in full command of his mental and physical faculties while driving 67 miles an hour would have been able to stop and avoid hitting the disabled vehicle.

The jury was properly charged concerning causation, and there was sufficient evidence admitted from which the jury could find beyond a reasonable doubt that appellant caused the deaths of Faul and Alford by reason of intoxication.

We overrule point of error one.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In point of error two, appellant contests the factual sufficiency of the evidence to support the causation element. The Court of Criminal Appeals recently reaffirmed its decision in *Clewis v. State*, 922 S.W.2d 126, 129-30) (Tex. Crim. App. 1996), that the appellate courts of this State are constitutionally empowered to review a judgment of a trial court to determine the factual sufficiency of the

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[3] *See* TEX. PENAL CODE §49.01(2)(B).

evidence used to establish the elements of the offense. *Johnson v. State*, 23 S.W.3d 1, 6 (Tex. Crim. App. 2000). The standard of review announced in *Clewis* was restated, as follows:

> In determining the factual sufficiency of the elements of the offense, the reviewing court "views all the evidence without the prism of 'in the light most favorable to the prosecution,' [i.e., views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d at 129.

Johnson, 23 S.W.3d at 6-7 (bracketed material in original). The Court further explained the court of appeals's task, as follows, "In conducting a factual sufficiency analysis, the reviewing court 'does not indulge inferences or confine its view to evidence favoring one side of the case. Rather it looks at all the evidence on both sides and then makes a predominantly intuitive judgment.' " *Id.*, at 7.

The Court also addressed the degree of deference the reviewing court must afford the fact finder.

> The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Such an approach occasionally permits some credibility assessment but usually requires deference to the jury's conclusion based on matters beyond the scope of the appellate court's legitimate concern. [Footnote and citation omitted.]

> Unless the available record clearly reveals a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor, and those jurors were in attendance when the testimony was delivered.
>
> * * *
>
> In conclusion, the reviewing court must always remain cognizant of the fact finder's role and unique position, a position that the reviewing court is unable to occupy. The authority granted in *Clewis* to disagree with the fact finder's determination is appropriate only when the record clearly indicates such a step is necessary to arrest the occurrence of a manifest injustice. Otherwise, due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence.

Id., at 8-9.

Finally, the Court held that its opinion in *Clewis* is to be read as adopting the complete civil factual sufficiency formulation.

> [T]he complete and correct standard a reviewing court must follow to conduct a *Clewis* factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although

> adequate if taken alone, is greatly outweighed by contrary proof.

Id., at 11.

After reviewing all the evidence admitted in this case in a neutral light, we do not find that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination. The evidence of guilt has been well summarized in this opinion.

Nor do we find that the proof of guilt is greatly outweighed by contrary proof. For the defense, Snyder testified that there was a third car that moved to the left just before appellant's vehicle struck the Hyundai; that the Hyundai's taillights were not on; and that appellant did not appear to be intoxicated. Appellant's father, Reckling, and Whilden also testified that appellant did not appear to be intoxicated. In addition, the defense's expert, James, testified that, according to his calculations, appellant's vehicle was traveling 80 miles per hour at impact.

This contrary proof, however, does not greatly outweigh the proof that appellant's intoxication caused the deaths of Faul and Alford. Snyder's testimony concerning the presence of the third car on the highway was contradicted by the testimony of State's witnesses Meier and Ciaccio. That the right rear taillight was burning at the moment of impact was the testimony of Spence, who tested the bulb at the crime lab. Appellant's state of intoxication was attested to by Neubauer, by appellant's admissions to the nurses that he had been drinking throughout the day and immediately before the collision, and by the blood test results. Regarding appellant's speed

at impact, Trooper Bryce testified that it was between 90 and 111 miles per hour, the exact speed depending on how many, if any, of the wheels on appellant's vehicle locked at impact. Bryce concluded that the most likely scenario was that the front wheels locked from metal collapse, indicating a speed of 95 to 96 miles per hour. Meier and Ciaccio testified that appellant's vehicle passed them at over 100 miles per hour shortly before the collision.

Because the jury's decision on guilt relied on its assessment of the credibility of the witnesses, we defer to its findings and hold the evidence was factually sufficient to support the jury's verdict that the victims' deaths were caused by appellant's intoxication.

We overrule point of error two.

STATE'S VOIR DIRE

In point of error three, appellant argues the trial court erred in overruling his objection to a portion of the State's voir dire that implied the defense had a burden to produce evidence on the issue of intoxication.

The State voir dired the venire panel concerning whether they could rely on the result of a blood test ordered by their own physician. A member of the venire said she might seek a second opinion. The assistant district attorney's response to the venireperson, and the bench conference that followed, were as follows:

> [A.D.A.]: And you have a right to [seek a second opinion]. And the defense has a right in every case to seek a second opinion. And so this

defendant is represented like all defendants by a lawyer and *they have a right to go out and get the blood tested themselves,* they have a right to do all of those things and Mr. DeGeurin is one of the best lawyers in the United States.

[Defense Counsel]: Excuse me. I object, but I would like to approach the bench.

(Sidebar conference outside the hearing of the jury:)

[Defense Counsel]: Judge, I am having trouble with that and I object to the prosecutor telling the jury that the defense has the opportunity or the right to go out and take a second opinion and produce evidence because the law is the defense does not have to produce any evidence and the prosecution cannot comment thereon. Now, whether or not he intended or not, at this point it raises a question if we do not present evidence after what the prosecutor said, are we failing to do something. That's contrary, it shifts the burden of proof and it's contrary to law, but I would ask that you instruct the jury that the last comment by the State is not correct and you will get a charge from the court as to what the law is, words to that effect, otherwise I have to quash the panel.

[A.D.A.]: I disagree completely with what he's saying. I think we have a right to make those arguments and I think they are valid areas of discussion for juries during voir dire examination.

[Defense Counsel]: Let me modify my objection. If you would instruct the jury that the defendant has no burden to call any witnesses or produce any evidence in a criminal case.

> The Court: The jury will certainly be instructed that the State has to prove their case beyond a reasonable doubt and you have no burden to produce evidence.
>
> [Defense Counsel]: Can you tell them that now?
>
> The Court: No. I'll tell them in my instructions. Certainly that's correct, you do have a right to get blood evidence. That's certainly something you can comment on. You can get evidence and basically I think that's all he said. They will be instructed in the charge that you do not have to produce any evidence.
>
> [Defense Counsel]: I would ask that you do that right now.
>
> The Court: No, I am not going to do that right now.

(Emphasis added.)

We find the trial court erred by refusing defense counsel's request to instruct the jury during voir dire that the defendant had no burden to produce evidence.

We must next determine whether the error was harmful. Rule 44.2 of the Rules of Appellate Procedure provides that constitutional error that is subject to a harmless error review requires reversal unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. TEX. R. APP. P. 44.2. We find that the error was not of constitutional magnitude. We therefore evaluate whether appellant's substantial rights were affected.

A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

We find the error did not have a substantial and injurious effect or influence in determining the jury's verdict. The trial court's refusal to give the requested oral instruction could not have misled the jury into believing appellant had a burden of producing evidence or any burden of proof in this case. This is because defense counsel voir dired the jury extensively concerning the presumption of innocence, the State's burden of proof, and the fact that, as he stated, "[T]he defendant has no burden whatsoever, doesn't have to call a single witness, doesn't have to say a word, the burden is on the State." In addition, the jury was correctly charged by the court regarding the State's burden of proof beyond a reasonable doubt and that "[t]he law does not require a Defendant to prove his innocence or produce any evidence at all."

We overrule point of error three.

DENIAL OF CHALLENGES FOR CAUSE

In points of error four and five, appellant argues the trial court erred in denying his challenges for cause to venirepersons Farley and Fowler.

Defense counsel questioned the venire panel about whether they could consider probation in an intoxication manslaughter case in which the accused had a prior conviction for driving while intoxicated. A number of venirepersons, including Farley and Fowler, responded that they could not. Farley was questioned at the bench, in part, as follows:

> [Defense Counsel]: I had asked you earlier about would you consider probation in the beginning and I had added in after awhile I added in where [it] was a prior DWI. Take that out, the DWI part. Take the prior DWI probation out. I am going to ask you again, could you consider probation where a person when you found a person guilty of intoxicated manslaughter causing the death of two people could you consider probation as a possible punishment?
>
> Farley: *I would say yes excluding knowing that he had a prior conviction for DWI. . . .*
>
> . . .
>
> [Defense Counsel]: But if you were to hear that he had a prior probation then you would not consider that as a possible punishment under any circumstances?
>
> Farley: That's correct.
>
> [A.D.A.]: But you can envision as you said a situation where you could consider probation for this type of offense?
>
> Farley: *I could definitely consider probation without the knowledge that he had been convicted before.*
>
> The Court: Thank you.

[Defense Counsel]: Challenge for cause.

The Court: Overruled.

(Emphasis added.)

Fowler was also questioned at the bench, in pertinent part, as follows:

> [Defense Counsel]: Ms. Fowler, I had asked you earlier today whether you could consider probation for someone convicted in this case. I also added in there and the person had prior probation. Take that out. I can't ask you that. Can you consider probation to someone that you have found guilty of – if you found a person guilty of intoxicated manslaughter, two people were killed, now the question is could you under those circumstances consider probation to that person you found guilty?
>
> Fowler: *Only if he had absolutely nothing else on his record.* I just lived with an alcoholic and I can't do it.
>
> [Defense Counsel]: You lived with an alcoholic?
>
> Fowler: I did. I was married to one. Okay? And I just – I can't do it. I am sorry.
>
> [Defense Counsel]: *So, if the second quēstion would be if you were to learn that he had a prior probation for DWI under that circumstance you could never consider probation?*
>
> Fowler: *I couldn't.* If he messed up the first time and did it again, messed up after the first time then the history that I have lived with it's going to happen again and again. I can't live with it. If you give me a second – I'll say in a whole different case I am not totally one-sided. If you

remember the case Bradley, I guess I was the only person for Galveston County who said he absolutely could not be guilty. That's a whole different thing.

The Court: Mr. Drosnes?

. . .

[Prosecutor]: What we are about is not to use you as a ping pong ball. We don't want to give you the impression that we are trying to tear you apart here. The question is you haven't heard the evidence?

Fowler: True.

[Prosecutor]: And we can't tell you what the evidence is. You are an intelligent woman. The question is this, can you envision a scenario, can you envision a fact situation that would authorize you to consider probation? There are thousands of fact situations out there and intoxication manslaughter – there are fact situations where the defendants have no prior criminal history, a good likelihood is going to be rehabilitated. You don't know that until you hear the evidence.

Fowler: That's true.

[Prosecutor]: The question is can you wait until you hear the evidence and can you say at that point I'll consider probation until I hear the evidence and I make up my own mind?

Fowler: I am afraid I have made it up. I am sorry. I do that. It's just a whole total block.

The Court: He's not asking you what you would do in this case. The question is can you consider probation in a case where a person was –

Fowler: *Not if it's happened before this.*

[Prosecutor]: That's a scenario that you could consider probation?

Fowler: That's about the only thing I can think of.

(Emphasis added.) The trial court overruled defense counsel's challenge for cause to Fowler.

Appellant claims the trial court erred in denying these two challenges for cause because the venirepersons were biased against a phase of the law upon which he was entitled to rely, namely, the minimum punishment. *See* TEX. CODE CRIM. P. art. 35.16(c)(2). Appellant filed an application for probation, and maintains he was eligible for probation from a jury. *See* TEX. CODE CRIM. P. art. 42.12 § 4. Bias against the range of punishment is a proper area for challenges for cause. *Williams v. State*, 773 S.W.2d 525, 536 (Tex. Crim. App. 1988).

However, the trial court did not err in denying appellant's challenges for cause because appellant's questions were improper to disqualify the venirepersons for cause. A juror must only be able to consider probation as punishment in a proper case for an offense as defined by law. Appellant's conviction for driving while intoxicated was not an element of the intoxication manslaughter case; it was evidentiary only. A venireperson is not disqualified merely because he or she could not consider probation under the specific facts of the case being tried that go beyond the elements of the offense. *See Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998); *McCoy v. State*, 996 S.W.2d 896, 899 (Tex. App. – Houston [14th Dist.]

1999, pet. ref'd); *see also White v. State*, 629 S.W.2d 701, 706 (Tex. Crim. App. 1981). As the Court explained in *Sadler:*

> The law *requires* jurors to use the facts to tailor the punishment to the crime as committed by the guilty defendant. As such, it would be nonsensical to rule that a juror who will use the facts to fit the punishment to the crime is unqualified and thus challengeable for cause – such a juror would be doing exactly what the law requires.
>
> . . .
>
> We hold that a prospective juror is not challengeable for cause because he or she will use the facts to determine punishment. A prospective juror is not challengeable for cause based on inability to consider the full range of punishment so long as he or she can consider the full range of punishment for the offense as defined by law.

Id. at 143. (Emphasis in original.)

The proper question to determine bias against the law regarding punishment would have been whether, in a proper intoxication manslaughter case as defined by statute, where the facts justify it, the venireperson could fully and fairly consider the entire range of punishment, including the minimum and maximum. *Sadler*, 977 S.W.2d at 142.

Both Farley and Fowler expressed that they could consider probation in a proper intoxication manslaughter case. Thus, they were not biased against the law regarding punishment.

Appellant relies on *Johnson v. State*, 982 S.W.2d 403, 404-05 (Tex. Crim. App. 1998). In that case, the Court of Criminal Appeals held that prospective jurors were challengeable for cause because they could not consider the minimum punishment for a defendant found guilty of aggravated robbery as a principal. The Court reasoned:

> [T]he Legislature has determined and codified that the full range of punishment for any offense is the same whether the defendant is found guilty as a principal or as a party. Therefore, a prospective juror who does not "believe in the full range of punishment," [citation omitted] for either a defendant found guilty as a principal or a defendant found guilty as a party, is biased against the law as established by the Legislature.

Id. at 406.

The present appeal is not controlled by *Johnson*. As Judge Keller pointed out in her concurring opinion, "[T]he law of parties, when implicated, is functionally an element of the offense tried,. . . . " *Id.* at 410 (Keller, J., concurring). We agree that criminal responsibility is a functional element of an offense, and, thus, part of the offense "as defined by law" for which prospective jurors must be able to consider the entire range of punishment.

By contrast, appellant's prior misdemeanor conviction for driving while intoxicated is not elemental to, nor part of, the offense of intoxication manslaughter. It is merely a peculiar fact relating to punishment in this particular case, and not "the law applicable to the case" for which prospective jurors could be challenged for cause.

Appellant also cites *Post v. State*, 936 S.W.2d 343 (Tex. App. – Fort Worth 1996, pet. ref'd). In that case, four counts of aggravated robbery were tried together, and two venirepersons expressed their inability to consider probation for a person whom they had found guilty of committing multiple aggravated robberies. *Id.* at 346. The court of appeals held that the trial court erred in overruling the defense challenges for cause. In that case, the defense was entitled to jurors who could consider the full range of punishment if they found the defendant guilty of all counts, *as charged*. In the present case, appellant's prior misdemeanor driving while intoxicated conviction was not part of the State's charges against him; it was merely evidentiary on the issue of punishment. We find the circumstances of *Post* to be inapposite to this appeal.

We overrule points of error four and five.

STATE'S JURY ARGUMENT ON GUILT

In point of error six, appellant complains of the following remarks of the prosecutor during his jury argument at the conclusion of the guilt stage:

> [A.D.A.]: And I tell you one thing, if it's a [sic] not guilty verdict or if it's a verdict of criminally negligent homicide, these folks will be going to celebrate tomorrow.
>
> [Defense Counsel]: You know, Judge, that's improper argument and I object to it.
>
> [A.D.A.]: Judge, I feel it's certainly proper. It's argument.
>
> The Court: Objection overruled.

> [A.D.A.]: And they are probably going to be celebrating at the Tremont House.
>
> [Defense Counsel]: Judge, if you don't stop it now it's going to be even worse and I object to it. It's outside the record and it's also – and if you want me to state it up there I will, but it's obviously improper argument.
>
> The Court: As far as going to the Tremont House, objection sustained.
>
> [A.D.A.]: I tell you who won't be there, and that's two poor kids from Galveston County who didn't deserve, who didn't deserve what this man did to them. And I tell you what these two kids, what these two poor Galveston County kids will never get to do in their lives, they will never get a chance to have flaming desserts in a fancy restaurant.

Appellant waived any objection to all but the first argument because he did not object or pursue the objection to an adverse ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

There are four permissible areas for jury argument: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answers to the argument of opposing counsel, and (4) pleas for law enforcement. *Cifuentes v. State*, 983 S.W.2d 891, 895 (Tex. App. – Houston [1st Dist.] 1999, pet. ref'd).

We find the State's argument that appellant would celebrate if the jury returned a verdict of not guilty or guilty of criminally negligent homicide does not fall into any of these categories and was therefore improper. We next consider whether the error was harmful. TEX. R. APP.

P. 44.2(b). We apply the three factors established by the Court of Criminal Appeals for analyzing harm from improper jury argument in *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). The factors are: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Id.; Cifuentes*, 983 S.W.2d at 896.

The prejudicial effect of the prosecutor's remarks was not severe. The remarks, while improper, were merely speculative of what appellant might do if found not guilty of the charges, or guilty of the lesser offense of criminally negligent homicide. Concerning the second factor, no curative instruction was given by the trial court. Finally, we find that the argument did not affect the certainty of conviction. The State's case was strong, as already addressed in this opinion. Thus, we find the error was harmless.

We overrule point of error six.

STATE'S JURY ARGUMENT ON PUNISHMENT

In point of error seven, appellant contends the State improperly argued at punishment that the victims' families did not want restitution. Appellant argues that, because the trial court granted the State's motion in limine to prevent the defense from mentioning the civil settlements and because such evidence was not offered at trial, the State's argument was outside the record.

The record reflects the following concerning the State's argument:

> [A.D.A.]: Restitution, what is that? Money? They don't want a penny from this man.
>
> [Defense Counsel]: Excuse me, Your Honor. That's outside the record.
>
> The Court: Objection sustained.
>
> [A.D.A.]: Judge, he argued that.
>
> The Court: Come on back up here.
>
> (The following proceedings were had outside the presence of the jury.)
>
> [Defense Counsel]: Comes now the Defendant out of the presence of the jury and moves for a mistrial. Throughout the trial we have by request of the State and granted by the Court not been allowed to get into the evidence that the family sued for money, paid both families, paid in excess of two hundred and fifty thousand dollars each, and that they even sued each other for money, and for the prosecutor now to state outside the record that he's not interested in money. Number 1, no one in the family testified they were not interested in money, and number two, the evidence that I was not allowed to put on shows that they were interested in money and were paid. So in light of that I move for a mistrial.
>
> The Court: Objection sustained. Motion for mistrial is denied.
>
> [Defense Counsel]: I ask that you instruct the jury that they must disregard the last statement of the prosecutor, and if they are unable to do so, tell us now.

[A.D.A.]: My argument was in response to Mr. DeGeurin's argument. He mentioned the word restitution countless times. He wants to compensate the victims, a percentage of his income going to the victims.

The Court: You said they are not interested in money?

[A.D.A.]: From this man.

The Court: They got money from the insurance company. Because of the fact we kept that out, you need to stay away from it.

[Defense Counsel]: I ask that the jury – so I don't have to move for a mistrial, could you tell me, Judge, what you intend to do?

The Court: I will just tell them to disregard anything that Mr. Ibrahim said about money.

[Defense Counsel]: Because I believe that is not sufficient, I'll move for a mistrial, but not in front of the jury, at this time.

The Court: Motion denied.

Ladies and gentlemen, I sustained the objection to Mr. Ibrahim's last statement. You are instructed to disregard anything that is said about money. It's not a part of this case and not anything for you to consider and you are instructed not to consider it. You may proceed.

Even assuming the State's argument was improper, the trial court's prompt and strong instruction to disregard was sufficient to cure any error. *Guidry v. State*, 9

S.W.3d 133, 154 (Tex. Crim. App. 1999). The motion for mistrial was properly denied.

We overrule point of error seven.

DEADLY WEAPON FINDING

In point of error eight, appellant challenges the legal sufficiency of the evidence to prove that he used or exhibited a deadly weapon, arguing that the State did not prove "use" of the automobile as a deadly weapon "according to what the Legislature intended when it created the deadly weapon provision of Article 42.12."[4] In point of error nine, he argues that the trial court erred in submitting the issue of the use or exhibition of a deadly weapon to the jury for the same reason.

The intoxication manslaughter paragraphs of the two indictments alleged that appellant "did use or exhibit a deadly weapon, to-wit: an automobile that in the manner of its use or intended use was capable of causing death or serious bodily injury." In addition, the trial court submitted a special issue on the use or exhibition of a deadly weapon in its guilt charges, which the jury answered affirmatively in both cases.

Appellant makes the same argument raised and rejected by the Court of Criminal Appeals in *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995), and *Tyra v. State*, 897 S.W.2d 796, 798-99 (Tex. Crim. App.

---

[4] Tex. Code Crim. P. art. 42.12 §3g(a)(2).

1995).[5] That is, appellant contends an affirmative finding of the use or exhibition of a deadly weapon is permitted only when there is evidence of actual intent to use the object to cause harm.

In *Tyra,* the Court held:

> Tyra was convicted of involuntary manslaughter, accidentally killing a man with his pickup truck because he was too drunk to control the vehicle. Our precedents establish that anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. . . . It follows that Tyra's pickup was undoubtedly a deadly weapon in the instant cause.

Id. at 798.

In *Walker,* the Court held:

> We therefore hold that the operation of an automobile may constitute the use of a deadly weapon under a prosecution under § 19.05(a)(2). We further hold that no intent to use the automobile as a weapon need be shown.

Walker, 897 S.W.2d at 814.

Based on these precedents, we overrule points of error eight and nine.

---

[5] The defendants in *Walker* and *Tyra* were convicted of involuntary manslaughter under former Penal Code section 19.05(a)(2). (See footnote 2 of this opinion.)

We affirm the judgments.

Frank C. Price[6]
Justice

Panel consists of Justices O'Connor, Hedges, and Price.

Justice O'Connor dissents from the denial of the further motion for rehearing and for rehearing en banc.

A majority of the justices of the Court voted to deny the further motion for rehearing en banc.

Publish. TEX. R. APP. P. 47.

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[6] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

Opinion issued October 5, 2000

(SEAL)

In The
Court of Appeals
For The
First District of Texas

NOS. 01-98-00891-CR
01-98-00892-CR

WILLIAM WALTON GLAUSER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause Nos. 97CR0019 and 97CR0020

DISSENTING OPINION ON FURTHER MOTION FOR REHEARING AND FOR REHEARING EN BANC

I dissent from the majority's resolution of points of error one and two.

The appellant collided with the victims early one morning on a busy freeway between Houston and Galveston. One of the victims of the collision was sitting in the stalled car and the other was behind the car pushing it. The majority's analysis ignores the possibility that collision occurred because the victims' car was immobile on a fast-moving freeway, it was dark and visibility was

not good, and one of the victims was blocking the taillights of the car. These factors alone could have made the collision inevitable, regardless of the appellant's intoxication.

I do not believe the jury could find, beyond a reasonable doubt, that the appellant's intoxication was responsible for the collision. In fact, the jury's assessment of only four years imprisonment in each case is some indication that it was less than certain the appellant's intoxication caused the collision.

Michol O'Connor
Justice

Panel consists of Justices O'Connor, Hedges, and Price.[1]

Publish. TEX. R. APP. P. 47.

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[1] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

P/NG JURY PUNISH/TDCJ [JUDG24] [REV. 05/98]

NO. 97CR0019

THE STATE OF TEXAS	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS 212TH JUDICIAL DISTRICT
VS.	
WILLIAM WALTON GLAUSER	(Filed Jul. 15, 1998)

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY JURY – NO COMMUNITY SUPERVISION GRANTED

Judge Presiding: Henry G. Dalehite Date of Judgment: July ~~14~~ [15], 1998 [LD]

Attorneys for State:
Larry Drosnes Attorney for Defendant: Mike Degeurin and Mohamid Ibrahim

Offense Convicted of:
Intoxication Manslaughter with Deadly Weapon P.C. Sec. 49.08

Degree: Second

Date Offense Committed: December 15, 1996

Charging Instrument: INDICTMENT

Plea: Not Guilty Jury Verdict: Guilty

Plea to Enhancement Paragraph(s): n/a

Findings on Enhancement: n/a

Findings on Use of Deadly Weapon: yes, the Court makes an affirmative finding that the Defendant used or exhibited a deadly weapon, to-wit: an automobile

Punishment Assessed by: the Jury

Date Sentence Imposed: July ~~14~~, [15], 1998 [LD]

Court Costs: $246.25

Punishment and [LD] Four (4) year(s) Institutional Division

Place of Confinement: of the Texas Department of Criminal Justice

Date to Commence: [LD] July ~~14~~, [15], 1998

Attorney Fees: $_____ Fine: $_____

Victim Restitution: $_____

Crime Stoppers: $25.00

County Jail Time Credit: ONE DAY

TOTAL AMOUNT OF RESTITUTION/REPARATION: **SEE ATTACHMENT "A" INCORPORATED HEREIN BY REFERENCE FOR ALL PURPOSES**

Concurrent Unless Otherwise Specified. _____

(*) AS STATED OR SHOWN ABOVE AND INCORPORATED HEREIN.

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of (*), and this cause being called for trial on the 30th day of June, 1998, the State appeared by her Assistant Criminal District Attorney, (*), and the Defendant appeared in person and by attorney, (*), and all parties announced ready for trial.

A jury composed of Stanley Smith and eleven others was selected impanelled, and sworn. The indictment was read to the Jury and the defendant, entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to

determine the guilt or innocence of the Defendant and the arguments of counsel, the jury retired in charge of the proper officer and returned into open Court on the 13th day of July, 1998, the following verdict which was received by the Court and is here entered of record upon the minutes:

> "We, the Jury, find the Defendant, WILLIAM WALTON GLAUSER, guilty of the offense of Intoxication Manslaughter as alleged in Count I of the indictment.
>
> /s/ STANLEY SMITH
> FOREMAN OF THE JURY"

SPECIAL ISSUE

A "deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or anything that, in the manner of its use or intended use, is capable of causing death or serious bodily injury.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

If you have found by your verdict that the Defendant, WILLIAM WALTON GLAUSER, is guilty of any offense as set out above, then you are instructed to answer the following issue:

> Do you, the Jury, affirmatively find beyond a reasonable doubt, that the Defendant, WILLIAM WALTON GLAUSER, used or exhibited a deadly weapon, to-wit: an automobile, during the commission of the offense of which you have found him guilty?
>
> ANSWER: We do so affirmatively find ✓
>
> /s/ STANLEY SMITH
> FOREMAN OF THE JURY"

The Defendant having requested in writing at the time he entered his plea that the jury assess punishment. The jury heard further evidence, was again charged by the Court, retired in charge of the proper officer, and returned into open Court on the 14th [15] [LD] day of July, 1998, the following verdict, which was received by the Court and is here entered of record upon the minutes:

> "We, the Jury, find the Defendant, WILLIAM WALTON GLAUSER, guilty of the offense of Intoxication Manslaughter and assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of _____ years. We do not recommend community supervision [probation].
>
> /s/ STANLEY SMITH
> FOREMAN OF THE JURY"

IT IS THEREFORE CONSIDERED, ORDERED, and ADJUDGED by the Court that the Defendant named above is guilty of the offense as indicated above, a felony, as found by verdict of the jury, and that the said Defendant committed the said offense on (*), and that he be punished as set forth above, and that the State of Texas do have and recover of the Defendant all costs of the

prosecution, for which execution will issue. The Defendant shall obey all rules and regulations of said facility until discharged from the facility.

It is therefore ordered that the Defendant be punished by confinement in the **Institutional Division of the Texas Department of Criminal Justice** for a period of (*), as found by the jury verdict.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him as follows, to-wit: It is the order of the Court that the Defendant, (*), who has been adjudged to be guilty of the offense indicated above, a felony, and whose punishment has been assessed at confinement in the **Institutional Division of the Texas Department of Criminal Justice** for the period indicated above, be delivered by the Sheriff of Galveston County, Texas, immediately to the Director of the Institutional Division of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institution in accordance with the provisions of the law governing Institutional Division of the Texas Department of Criminal Justice.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

And, the Defendant's thumbprint that appears on this judgment was taken in accordance with Article 38.33 of the Texas Code of Criminal Procedure.

Said Defendant is given credit on this sentence for time served in the Galveston County Jail since/from (*). Sentence is to commence and begin on (*).

SIGNED on this the 15th day of July, A.D., 1998.

DEFENDANT'S RIGHT THUMBPRINT
[OMITTED IN PRINTING]

/s/ Henry G. Dalehite
JUDGE PRESIDING

NOTICE OF APPEAL: Given

VOL. _____ PAGE: _____

ATTACHMENT A

STATE OF TEXAS

VS.

WILLIAM WALTON GLAUSER CAUSE NO: 97CR0019

( ) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Court finds that the victim(s) of this crime is (are) owed restitution. Such restitution shall be ordered as a condition of parole.

VICTIM: _____

ADDRESS: _____

_____

AMOUNT: $_____

(X) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston

County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ as reimbursement for court appointed attorneys fees. Such fees shall be ordered as a condition of parole.

(X) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ for Court Costs. Such costs shall be ordered as a condition of parole.

( ) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ as a fine. Such fine shall be ordered as a condition of parole.

(X) Pursuant to Article 37.072, 42.151 and 42.18 8(g), Texas Code of Criminal Procedure, the Defendant is ordered to pay to _____ Crime Stoppers Program, _____, $25.00 as repayment for a Crime Stoppers award distributed in this case. Such repayment shall be ordered as a condition of parole.

( ) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal procedure the Defendant is ordered to pay to the G.C.C.S.C.D. $_____ to reimburse the County for extradition costs. Such costs shall be ordered as a condition of parole.

( ) Attend and successfully complete a program designed to educate persons on the dangers of drug abuse pursuant to Article 6687b, Section 24B of the Revised Civil Statues [sic].

( ) The Defendant's driver's license will be suspended for 180 days and continue for an indefinite period up and until the Defendant completes the education

program pursuant to Art. 6687b24 B(g)(1) Revised Civil Statues [sic].

( ) The Defendant's driver's license will be suspended for one (1) year.

BILL OF COSTS

NO. 97CR0019–212th

THE STATE OF TEXAS	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS
VS.	
William W. Glauser	July TERM, 1998

The following Fine and Costs are taxed against the Defendant in the above entitled and number [sic] cause, to wit:

District Clerk's Costs

District Clerk's Costs (Art. 102.005, CCP)	$ 40.00
State Fee (Art. 102.075 CCP)	80.00
Fugitive Apprehension Fund (Art. 102.019 CCP)	5.00
Compensation to Victims Fund (Art. 56.55 CCP)	45.00
Judicial and Court Personnel Training Fund (Govt. Code Sec. 56.001)	1.00
Records Management and Preservation Fund (art. 102.005 CCP) ($10.00) Upon Conviction	10.00
Courthouse Security Fee (art. 102.017) ($5.00) Upon Conviction	5.00
Juvenile Crime Center (Art. 102.075 CCP)	.25
TOTAL CLERK'S COSTS	$186.25

Sheriff's Costs

Fine	____
Jury Fee, each Defendant convicted by a Jury [Art. 102.004 (a), CCP] ($20.00)	20.00
Issuing Written Notice to Appear in Court or Making Arrest Without Warrant ($5.00)	____
Executing or Processing an Issued Arrest Warrant or Capias ($35.00)	____
Summoning a Witness ($5.00)	5.00
Executing Writ not Otherwise Listed ($35.00)	____
Taking & Approving a Bond & Returning it to Courthouse ($10.00)	10.00
Committment or Release ($5.00)	20.00
Summoning a Jury ($5.00)	5.00
Attendance of a Prisoner in a Habeas Corpus Case if Prisoner has been Remanded to Custody or Held Bail ($8.00 per day)	____
Conveying a Prisoner After Conviction or Conveying a Prisoner Arrested in Another County ($ .21 per Mile)	____
Travel to Attach a Witness Ordered by the Court Outside the County And Actual Expenses for Travel by the Most Practical Public Conveyance ($10.00 per day)	____

Other Costs

Visual Record by Electronic Device if Court Assesses Video Fee on D.W.I. Convictions (Art. 102.018 CCP) ($15.00)	____
Graffiti Eradication Fee – if Defendant is Convicted of A Crime Related to Graffiti (Art. 28.08 PC) ($5.00)	____
Time Payment Fee – if Defendant is Paying Court Cost, Fine or Restitution Over a Period of Time. (Art. 51.921 TGC) ($25.00)	____
Interpreter's Fees	____
TOTAL FINE AND COSTS	$246.25

THE STATE OF TEXAS
COUNTY OF GALVESTON

I, **EVELYN WELLS ROBISON,** Clerk of the District Court in and for Galveston County, Texas, hereby certify the within and foregoing to be a true and correct account of the fine [sic] and costs in the within entitled and numbered cause to this date.

WITNESS my hand and seal of office, at Galveston, Texas, this 15th day of July, 1998

EVELYN WELLS ROBISON
Clerk, District Court
Galveston County, Texas

By: /s/ Latonia Wilson, Deputy

[SEAL]

SHERIFF'S RETURN

Received of _____, the sum of _____ dollars, being the full amount of the within fine [sic] and costs, this _____ day _____, _____.

JOE MAX TAYLOR, Sheriff
Galveston County, Texas

By: _____

P/NG JURY PUNISH/TDCJ [JUDG24] [REV. 05/98]

NO. 97CR0020

THE STATE OF TEXAS	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS 212TH JUDICIAL DISTRICT
VS.	
WILLIAM WALTON GLAUSER	(Filed Jul. 15, 1998)

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY JURY – NO COMMUNITY SUPERVISION GRANTED

Judge Presiding: Henry G. Dalehite Date of Judgment: July ~~14~~ [15], 1998 [LD]

Attorneys for State: Larry Drosnes Attorney for Defendant: Mike Degeurin and Mohamid Ibrahim

Offense Convicted of: Intoxication Manslaughter with Deadly Weapon P.C. Sec. 49.08

Degree: Second

Date Offense Committed: December 15, 1996

Charging Instrument: INDICTMENT

Plea: Not Guilty Jury Verdict: Guilty

Plea to Enhancement Paragraph(s): n/a

Findings on Enhancement: n/a

Findings on Use of Deadly Weapon: yes, the Court makes an affirmative finding that the Defendant used or exhibited a deadly weapon, to-wit: an automobile

Punishment Assessed by: the Jury

Date Sentence Imposed: July ~~14~~, [15], 1998 [LD]

Court Costs: $216.25

Punishment and [LD] Four (4) year(s) Institutional Division

Place of Confinement: of the Texas Department of Criminal Justice

Date to Commence: [LD] July ~~14~~, [15], 1998

Attorney Fees: $_____ Fine: $_____

Victim Restitution: $_____

Crime Stoppers: $25.00

County Jail Time Credit: ONE DAY

TOTAL AMOUNT OF RESTITUTION/REPARATION: **SEE ATTACHMENT "A" INCORPORATED HEREIN BY REFERENCE FOR ALL PURPOSES**

Concurrent Unless Otherwise Specified. _____

(*) AS STATED OR SHOWN ABOVE AND INCORPORATED HEREIN.

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of (*), and this cause being called for trial on the 30th day of June, 1998, the State appeared by her Assistant Criminal District Attorney, (*), and the Defendant appeared in person and by attorney, (*), and all parties announced ready for trial.

A jury composed of Stanley Smith and eleven others was selected impanelled, and sworn. The indictment was read to the Jury and the defendant, entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to

determine the guilt or innocence of the Defendant and the arguments of counsel, the jury retired in charge of the proper officer and returned into open Court on the 13th day of July, 1998, the following verdict which was received by the Court and is here entered of record upon the minutes:

> "We, the Jury, find the Defendant, WILLIAM WALTON GLAUSER, guilty of the offense of Intoxication Manslaughter as alleged in Count I of the indictment.
>
> /s/ STANLEY SMITH
> FOREMAN OF THE JURY"

SPECIAL ISSUE

A "deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or anything that, in the manner of its use or intended use, is capable of causing death or serious bodily injury.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

If you have found by your verdict that the Defendant, WILLIAM WALTON GLAUSER, is guilty of any offense as set out above, then you are instructed to answer the following issue:

Do you, the Jury, affirmatively find beyond a reasonable doubt, that the Defendant, WILLIAM WALTON GLAUSER, used or exhibited a deadly weapon, to-wit: an automobile, during the commission of the offense of which you have found him guilty?

ANSWER: We do so affirmatively find ✓

/s/ STANLEY SMITH
FOREMAN OF THE JURY"

The Defendant having requested in writing at the time he entered his plea that the jury assess punishment. The jury heard further evidence, was again charged by the Court, retired in charge of the proper officer, and returned into open Court on the ~~14~~th [15] [LD] day of July, 1998, the following verdict, which was received by the Court and is here entered of record upon the minutes:

"We, the Jury, find the Defendant, WILLIAM WALTON GLAUSER, guilty of the offense of Intoxication Manslaughter and assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of _____ years. We do not recommend community supervision [probation].

/s/ STANLEY SMITH
FOREMAN OF THE JURY"

IT IS THEREFORE CONSIDERED, ORDERED, and ADJUDGED by the Court that the Defendant named above is guilty of the offense as indicated above, a felony, as found by verdict of the jury, and that the said Defendant committed the said offense on (*), and that he be punished as set forth above, and that the State of Texas do have and recover of the Defendant all costs of the

prosecution, for which execution will issue. The Defendant shall obey all rules and regulations of said facility until discharged from the facility.

It is therefore ordered that the Defendant be punished by confinement in the **Institutional Division of the Texas Department of Criminal Justice** for a period of (*), as found by the jury verdict.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him as follows, to-wit: It is the order of the Court that the Defendant, (*), who has been adjudged to be guilty of the offense indicated above, a felony, and whose punishment has been assessed at confinement in the **Institutional Division of the Texas Department of Criminal Justice** for the period indicated above, be delivered by the Sheriff of Galveston County, Texas, immediately to the Director of the Institutional Division of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institution in accordance with the provisions of the law governing Institutional Division of the Texas Department of Criminal Justice.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence.

And, the Defendant's thumbprint that appears on this judgment was taken in accordance with Article 38.33 of the Texas Code of Criminal Procedure.

Said Defendant is given credit on this sentence for time served in the Galveston County Jail since/from (*). Sentence is to commence and begin on (*).

SIGNED on this the 15th day of July, A.D., 1998.

DEFENDANT'S RIGHT THUMBPRINT
[OMITTED IN PRINTING]

/s/ Henry G. Dalehite
JUDGE PRESIDING

NOTICE OF APPEAL: Given

VOL. _____ PAGE: _____

_____

ATTACHMENT A

STATE OF TEXAS

VS.

WILLIAM WALTON GLAUSER CAUSE NO: 97CR0020

( ) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Court finds that the victim(s) of this crime is (are) owed restitution. Such restitution shall be ordered as a condition of parole.

VICTIM: _____

ADDRESS: _____

_____

AMOUNT: $_____

(X) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston

County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ as reimbursement for court appointed attorneys fees. Such fees shall be ordered as a condition of parole.

(X) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ for Court Costs. Such costs shall be ordered as a condition of parole.

( ) Pursuant to Article 42.18 8(g), of the Texas Code of Criminal Procedure the Defendant is ordered to pay to Evelyn Wells Robison, District Clerk of Galveston County, Room 404 Galveston County Courthouse, Galveston, Texas, $_____ as a fine. Such fine shall be ordered as a condition of parole.

(X) Pursuant to Article 37.072, 42.151 and 42.18 8(g), Texas Code of Criminal Procedure, the Defendant is ordered to pay to _____ Crime Stoppers Program, _____, $25.00 as repayment for a Crime Stoppers award distributed in this case. Such repayment shall be ordered as a condition of parole.

( ) -Pursuant to Article 42.18 8(g), of the Texas Code of Criminal procedure the Defendant is ordered to pay to the G.C.C.S.C.D. $_____ to reimburse the County for extradition costs. Such costs shall be ordered as a condition of parole.

( ) Attend and successfully complete a program designed to educate persons on the dangers of drug abuse pursuant to Article 6687b, Section 24B of the Revised Civil Statues [sic].

( ) The Defendant's driver's license will be suspended for 180 days and continue for an indefinite period up and until the Defendant completes the education

program pursuant to Art. 6687b24 B(g)(1) Revised Civil Statues [sic].

( ) The Defendant's driver's license will be suspended for one (1) year.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

May 16, 2001
COA#: 01-98-00891-CR
RE: Case No. 0270-01
STYLE: GLAUSER, WILLIAM WALTON

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

May 16, 2001
COA#: 01-98-00892-CR
RE: Case No. 0271-01
STYLE: GLAUSER, WILLIAM WALTON

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

September 12, 2001 (Filed Sep. 13, 2001)
COA#: 01-98-00891-CR
RE: Case No. 0270-01
STYLE: GLAUSER, WILLIAM WALTON

On this day, the Appellant's Motion for Rehearing has been denied.

Troy C. Bennett, Jr., Clerk

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

September 12, 2001 (Filed Sep. 13, 2001)
COA#: 01-98-00892-CR
RE: Case No. 0271-01
STYLE: GLAUSER, WILLIAM WALTON

On this day, the Appellant's Motion for Rehearing has been denied.

Troy C. Bennett, Jr., Clerk